

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

**Petition for Declaratory Ruling that USA
Datanet Corp. Is Liable for Originating
Interstate Access Charges When it uses
Feature Group A Dialing to Originate Long
Distance Calls**

WC Docket No. 05-276

COMMENTS OF USA DATANET CORP.

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Dated: January 9, 2006

SUMMARY

Frontier has a pending lawsuit seeking access charges under its federal tariff against USA Datanet in the United States District Court for the Western District of New York. In that action, USA Datanet filed a Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State Claims Upon Which Relief Can Be Granted (“Motion”). The District Court denied the Motion but chose to stay the action until the Commission issues a decision in its *IP-Enabled Services* Proceeding or addresses the VarTec Petition for Declaratory Ruling, after which the District Court can decide whether:

- to dismiss Frontier’s claims for failure to state claims upon which relief can be granted;

- to address the merits of Frontier’s claims without further input from the Commission; or

- to refer to the Commission, pursuant to the doctrine of primary jurisdiction, the specific questions the District Court deems necessary to answer in order to resolve the pending action.

Notably, in reaching its decision to deny USA Datanet’s Motion, the District Court declined to refer *any* specific questions to the Commission pursuant to the doctrine of primary jurisdiction.

Frontier chose not to appeal the District Court’s decision and has not withdrawn its federal court lawsuit freeing it to file a Formal Complaint with the Commission against USA Datanet. Instead, Frontier filed a Petition for Declaratory Ruling (“Petition”) asking the Commission to award Frontier the exact same relief that Frontier is seeking in its pending lawsuit. Surprisingly, Frontier falsely claims the District Court made a primary jurisdiction referral directing Frontier to file its Petition. While this contention is baseless, it nonetheless confirms that Frontier itself recognizes that, through its Petition, Frontier is attempting to raise exactly the same issues, and is seeking exactly the same relief, as it is in the pending District Court lawsuit. As such, Frontier’s Petition constitutes a blatant attempt to have the Commission

improperly establish concurrent jurisdiction over Frontier's collection action against USA Datanet in violation of Section 207 of the Communications Act of 1934. Section 207 unequivocally prevents the agency from hearing petitions that essentially duplicate federal court complaints, and the Commission has recognized that this bar is jurisdictional. Thus, Frontier is precluded, as a matter of law, from seeking relief from the Commission that is substantially similar to the relief Frontier has requested in its currently pending lawsuit in federal court. Therefore, the Commission should reject the Petition without consideration of the merits since the agency should not, and indeed legally cannot, undermine the District Court decision by ruling on Frontier's Petition.

Apart from the constraints imposed by Section 207, Frontier's Petition is the wrong method by which to resolve its dispute with USA Datanet. Importantly, the Petition fails to provide the factual basis on which the Commission could resolve the dispute Frontier has with USA Datanet, and this fatal deficiency cannot be remedied through the comments of third parties or in any reply comments filed by Frontier. For example, Frontier has failed to describe why USA Datanet is a "customer" that has ordered and received switched access services pursuant to the tariff provisions upon which Frontier based its arguments. This failure underscores why – *assuming* the District Court action were not pending and the Section 207 bar was removed – the fact-specific dispute Frontier raised in its Petition should only be resolved by the Commission in a formal complaint proceeding governed by the Commission's pleading, discovery, and briefing rules. Therefore, even if Frontier's District Court action were not currently pending, the Commission should reject Frontier's Petition without consideration of the merits because a declaratory ruling proceeding is the improper vehicle to address the tariff dispute Frontier has with USA Datanet.

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USA Datanet Corp. ("USA Datanet"), by its undersigned counsel and pursuant to the Commission's December 9, 2005, Public Notice,¹ hereby files Comments in opposition to the above-captioned Petition for Declaratory Ruling ("Petition") filed with the Federal Communications Commission ("Commission") by Frontier Telephone of Rochester, Inc. ("Frontier") on November 22, 2005. Frontier falsely claims its Petition is based upon a primary jurisdiction referral from the United States District Court for the Western District of New York.² Frontier makes this claim in order to convince the Commission to exercise concurrent jurisdiction over a tariff dispute that is currently pending before the United States District Court for the Western District of New York, which violates Section 207 of the Communications Act of 1934, as amended.³ Section 207 bars consideration of Frontier's Petition on the merits because, in both the lawsuit pending in District Court and the Petition, Frontier seeks an order that USA Datanet must pay Frontier's Feature Group A access charges as billed to USA Datanet.

¹ Public Notice, WC Docket No. 05-276, DA 05-3165 (released Dec. 9, 2005).

² *Frontier Telephone of Rochester, Inc., v. USA Datanet Corp.*, Decision and Order, 05-cv-0656 CJS (W.D.N.Y. Aug. 4, 2005) ("*Order*") (Petition Exhibit D).

³ 47 U.S.C. § 207.

Therefore, USA Datanet respectfully requests that the Commission find that the Petition is procedurally barred.

Furthermore, the Petition raises a tariff dispute that is properly the subject of a Formal Complaint before the Commission or, as is already the case, a court lawsuit. The Commission should take the opportunity to make clear that parties should not seek resolution of tariff disputes, such as the one Frontier raises, through petitions for declaratory ruling. Indeed, the Petition fails to establish any basis for the relief requested, which underscores that the proper course for resolving Frontier's dispute is the federal court lawsuit that is pending or, in the event that complaint is withdrawn and Section 207 no longer acts as a bar, through a Section 208 Formal Complaint before the Commission.

I. BACKGROUND

USA Datanet is a provider of Internet Protocol ("IP") enabled services, which are commonly referred to as Voice over Internet Protocol ("VoIP") services, throughout the state of New York. In support of its provision of VoIP services to its customers, USA Datanet purchases originating telecommunications services from a third-party carrier, Paetec Communications, Inc. ("Paetec"). Paetec is a competitive local exchange carrier ("CLEC"), which is, in turn interconnected with other carriers, including Frontier.

USA Datanet does not exchange any traffic directly with Frontier; rather, any USA Datanet customer traffic originating on Frontier's network is handed off to Paetec, which in turns hands the traffic off to USA Datanet. Frontier concedes that USA Datanet is not directly interconnected with Frontier.⁴ Frontier's Petition does not identify, nor does Frontier's tariff

⁴ Petition at 2.

describe, any Feature Group A charges that, under Frontier's tariff, can be applied to service providers – whether unregulated information service providers or regulated interexchange carriers – with which Frontier is not directly interconnected. Nonetheless, Frontier maintains that it is entitled to Feature Group A access charges from USA Datanet under its federal tariff. Frontier began billing USA Datanet for interstate Feature Group A access charges almost three years ago. Based on this claim, in February 2005, Frontier brought suit against USA Datanet in the United States District Court for the Western District of New York, seeking payment of the access charges Frontier had billed as well as Frontier's tariffed late payment charges.

USA Datanet sought dismissal of Frontier's federal complaint on two grounds: (1) the doctrine of primary jurisdiction; and (2) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).⁵ On August 8, 2005, the District Court denied the USA Datanet Motion in its entirety, but stayed the proceeding pending the outcome of two then (and still) pending Commission proceedings discussed in USA Datanet's papers – the *IP-Enabled Services* rulemaking and the VarTec petition for declaratory ruling – which the District Court expected would provide it with relevant guidance.⁶ In so doing, the District Court retained jurisdiction over the Frontier Complaint in its entirety, and to date has not referred any questions to the Commission.

Frontier did not appeal or seek review of the District Court's decision. Nor did Frontier make its own request to the District Court that the Court refer specific questions to the Commission on a primary jurisdiction referral. Nor did Frontier withdraw its federal complaint

⁵ See Defendant's Memorandum of Law in Support of its Motion to Dismiss Based upon the Doctrine of Primary Jurisdiction and for Failure to State Claims Upon Which Relief Can Be Granted, 05-cv-6056 (CJS) (dated Mar. 31, 2005) ("USA Datanet Motion") (Petition Exhibit C).

in anticipation of seeking relief from the Commission in its dispute with USA Datanet through a formal complaint. Nonetheless, Frontier impermissibly seeks to sidestep the District Court's decision by filing the Petition. In support thereof, Frontier falsely claims that "the District Court referred the issue of the applicability of Frontier's access charges [to USA Datanet] to the Commission on the basis of primary jurisdiction."⁷ As explained below, Frontier's Petition is a brash and illegal attempt to establish concurrent jurisdiction over Frontier's collection action against USA Datanet.

II. SECTION 207 OF THE ACT PRECLUDES THE COMMISSION FROM TAKING JURISDICTION OVER THE PETITION

Frontier's Petition asks the Commission to run roughshod over the restrictions on parties taking two bites at the apple that are contained in Section 207 of the Communications Act of 1934. Section 207 prevents the agency from assuming jurisdiction over disputes that essentially duplicate federal court complaints. The Commission has recognized that the bar in Section 207 to instituting concurrent similar actions is jurisdictional. Thus, Frontier is precluded as a matter of law from seeking, as it does here, substantially similar relief from both the federal court and the Commission. Therefore, USA Datanet respectfully requests the Commission to reject Frontier's Petition without consideration of the merits.

The Communications Act prohibits persons from seeking damages from common carriers before both a federal district court and the Commission. Specifically, Section 207 provides in relevant part as follows:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter *may either make complaint to the Commission as*

⁶ Order at 14.

⁷ Petition at 5.

hereinafter provided for, *or may bring suit* for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; *but such person shall not have the right to pursue both such remedies.*⁸

The plain language of Section 207 is clear and unambiguous: an action for damages against a common carrier *cannot* be brought simultaneously to federal court and to the Commission.

Here, there is undisputedly a pending federal court action in which Frontier has sought relief on the basis that USA Datanet allegedly failed to pay Frontier Feature Group A access charges. In both that case and in the Petition, Frontier seeks an order for damages. In the Petition, Frontier seeks

a declaratory ruling that Datanet . . . must pay Frontier its duly tariffed originating interstate access charges as billed by Frontier on a meet point billing basis, plus Frontier's duly tariffed late payment charges.⁹

Frontier notes in the Petition that “[t]he amount at issue, including late payment charges, exceeds \$1 million.”¹⁰

Eight months ago, Frontier filed a lawsuit in federal court demanding judgment because, allegedly,

USA Datanet has breached its obligation to pay Frontier for amounts due for interstate originating switched access services in the amount of at least \$679,066.20, plus late fees in the amount of \$251,457.50, and Frontier has been damaged thereby.¹¹

During the eight months Frontier's lawsuit has been pending, the amount of access charges Frontier is demanding has continued to mount, presumably due to late charges. As such, it is

⁸ 47 U.S.C. § 207 (emphasis added).

⁹ Petition at 5.

¹⁰ *Id.* at 1.

¹¹ Petition, Exhibit B: *Frontier Telephone of Rochester, Inc., v. USA Datanet Corp.*, Complaint, 05-cv-6056 (CJS) at 5, ¶ 25.

clear that Frontier seeks the same relief in its Petition that it seeks in Federal District Court. Section 207 prohibits this. Indeed, Frontier claims that it filed its Petition pursuant to the doctrine of primary jurisdiction, which confirms that it is seeking the same relief before the Commission as it has claimed in its currently pending lawsuit before the District Court.

As the Commission has held, Section 207 is a jurisdictional, rather than merely discretionary, bar to concurrent complaints.¹² In fact, in COMSAT, the Commission dismissed a complaint with prejudice under Section 207 despite the fact that the related court action had been terminated. The Commission held that “[u]nder section 207, a complainant may not pursue a lawsuit against a common carrier ... and also file a complaint with the Commission under section 208.”¹³ The Commission explained that the basis of Section 207 is “avoiding duplicative litigation and maximizing judicial economy,”¹⁴ and thus, even though COMSAT’s federal suit for damages had already been dismissed, the Commission would conflict with Section 207 if it had taken jurisdiction of COMSAT’s subsequent, similar claim. Dismissal of Frontier’s Petition under Section 207 in light of the pending federal lawsuit is mandatory, and would “avoid duplicative litigation and maximize judicial economy” by preventing the Commission from impinging on the questions arising in the Frontier-USA Datanet dispute that the District Court has reserved, at least for the time being, to itself.

¹² *COMSAT Corp. v. IDC Mobile Communications, Inc.*, 15 FCC Rcd 7906 (2000).

¹³ *Id.*, 15 FCC Rcd at 7916, ¶ 26.

¹⁴ *Id.*

The Commission does recognize an exception to Section 207 where a district court has referred questions of regulatory law under the doctrine of primary jurisdiction.¹⁵ Where a federal judge determines that resolution of a lawsuit before the court would be facilitated by referring questions to the Commission, *and* the judge in fact either specifically refers questions to the agency or directs the parties to bring questions to the agency, Section 207 does not bar the agency from resolving those specific questions.

The District Court here did not specifically refer questions to the Commission or direct the parties to bring any questions to the agency. To the contrary, the District Court explicitly and unambiguously denied USA Datanet's motion in its entirety, including USA Datanet's request to refer the questions necessary to resolve the dispute to the Commission pursuant to the doctrine of primary jurisdiction. Rather than referring questions to the Commission, the District Court chose to await the Commission's decisions in two proceedings dealing with one of the central core issues of this party-specific controversy: whether originating VoIP traffic entitles carriers to access charges.¹⁶ With respect to this issue, the District Court homed in on two proceedings already underway at the Commission: the *IP-Enabled Services NPRM* and the *VarTec Petition for Declaratory Ruling*.¹⁷ Recognizing that the Commission has

¹⁵ See, *Mocatta Metals Corp. v. ITT World Communications, Inc.*, 44 FCC 2d. 605 (1973); see also, *Fair Mount Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 53 Rad. Reg. 2d 639 (1983).

¹⁶ Order at 4-5 (citing *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 (2004); Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers (filed Aug. 20, 2004)).

¹⁷ Order at 4-5, 10-11. The District Court expressly recognized that the *IP-Enabled Services* docket "is particularly concerned with the issue of whether, and to what extent, VoIP providers should have to pay access charges." *Id.* at 12-13. The District Court also noted that "the VarTec matter that is now pending before the Commission also raises an issue

been seeking comments on these issues in these two proceedings since 2004 when the rulemaking was initiated, the District Court imposed a stay,¹⁸ concluding that “it would be prudent” to await the Commission’s decisions in these proceedings, which will “resolve[] the issue of whether or not VoIP providers such as Datanet are liable for access charges” under the Commission’s rules.¹⁹ The District Court did *not* refer any specific questions to the FCC for resolution, however. Nor did it direct or authorize Frontier to seek resolution of specific questions from the Commission. Frontier therefore cannot claim that “the issue of the applicability of Frontier’s access charges [has been referred] to the Commission” or that the *Order* renders its Petition exempt from the jurisdictional bar of Section 207.²⁰

Once the Commission issues decisions in one or both of these proceedings, of course, the District Court will decide whether:

to dismiss Frontier’s claims for failure to state claims upon which relief can be granted;

to address the merits of Frontier’s claims without further input from the Commission; or

to refer to the Commission, pursuant to the doctrine of primary jurisdiction, the specific questions the District Court deems necessary to answer in order to resolve the pending action.

In sum, given the limited nature of the District Court’s Order and the lack of a primary jurisdiction referral, the Petition asks the Commission to do nothing short of violate Section 207. The Commission should reject the Petition as procedurally defective without reaching its merits.

that is almost identical to the one being raised in [the Frontier complaint].” Id. at 13 (emphasis added).

¹⁸ *Id.* at 14.

¹⁹ *Id.*

²⁰ Petition at 5.

III. THIS DISPUTE IS NOT A PROPER SUBJECT FOR A DECLARATORY RULING

Even if Section 207 did not bar the Petition, which it does, the Commission should decline to resolve the Petition. Frontier attempts to use the declaratory ruling process in order to pursue what amounts to a collection action resulting from a tariff dispute between two parties. Such a dispute, if it is a proper matter for Commission resolution, should be brought as a Section 208 compliant and *not* as a request for declaratory ruling.

As an initial matter, declaratory rulings are discretionary if the subject matter of the request falls within the Commission’s jurisdiction. The Commission’s discretion is especially broad where the Petition is not the product of a primary jurisdiction referral. However, Frontier did not seek a Commission ruling on a regulatory issue of general application, which is the type of ruling the declaratory ruling process is designed to enable. Rather, Frontier seeks a ruling on whether a specific party – USA Datanet – owes a specific amount of money pursuant to a specific tariff – Frontier’s federal tariff – due to the specific manner in which USA Datanet is interconnected with Paetec.²¹ A formal complaint, rather than a declaratory ruling, is the proper procedural vehicle for the Commission addressing this type of party-specific tariff dispute. However, as explained above, since Frontier has already filed a lawsuit against USA Datanet in the United States District Court for the Western District of New York, which remains pending, Frontier cannot file a formal complaint with the Commission. It is likely for this reason that Frontier fashioned its dispute to the Commission as a “Petition for Declaratory Ruling,” despite the fact that the pleading raises the type of dispute, and requests the type of relief, that is

²¹ Frontier’s gratuitous and ambiguous comment that it is “currently investigating another [‘]carrier[’],” Petition at 5, n.6, should be seen for what it is – an unconvincing attempt to generalize the request. The Petition, read as a whole, leaves no doubt that USA Datanet is Frontier’s sole specific target.

appropriate only for a formal complaint. Thus, separate and apart from the Section 207 bar to the Petition, the Commission should decline to resolve the Petition on its merits.

A. The District Court Did Not Refer Any Questions to the Commission Pursuant To A Primary Jurisdiction Referral

Contrary to Frontier's unfounded assertion, this matter is not before the Commission "pursuant to the Court's referral on the ground of primary jurisdiction."²² In fact, USA Datanet requested a primary jurisdiction referral from the district court and was denied that relief.²³ *There is no referral from the district court.* Likewise, the Court did not direct the parties to refer any questions to the Commission. Rather, the Court simply stayed the action until the Commission decides either the *IP-Enabled Services* rulemaking or resolves the *Vartec* petition. The Commission therefore has no obligation to respond to Frontier's demand for relief.

The *Order* is clear that the District Court did not find it necessary or advisable to issue yet another request for a Commission decision when two germane decisions are forthcoming, particularly since the Commission might issue decisions in those proceedings before it could respond to a primary jurisdiction referral, which would delay resolution of Frontier's lawsuit. Frontier's Petition is thus not an implementation of a court directive, but rather a unilateral and improper attempt to seek relief in an additional forum – the Commission.

²² Petition at 5.

²³ See, e.g., Defendant's Memorandum of Law In Support Of Its Motion To Dismiss Based Upon The Doctrine of Primary Jurisdiction And For Failure To State Claims Upon Which Relief Can Be Granted (Appended to the Petition as Exhibit C) at 21 ("USA Datanet respectfully requests that the Court . . . dismiss the Complaint, without prejudice, and refer Plaintiff's claims to the FCC").

As explained above, the attempt contravenes the plain language of Section 207, as well as the Commission's precedent implementing that provision, and thus must be rejected.²⁴

B. The Issuance of a Declaratory Ruling, Assuming the Commission Could Assert Jurisdiction in This Matter, Is Purely Discretionary

Because the District Court did not refer, or direct the parties to bring, *any* questions pertaining to the parties' dispute to the Commission upon a finding of primary jurisdiction, the Commission is not compelled to entertain the Petition. Indeed, Section 1.2 of

²⁴ When a court refers questions to the Commission pursuant to the doctrine of primary jurisdiction, the judge determines which questions must be answered in order to resolve the pending lawsuit and either refers the questions to the Commission or directs the parties to do so. *See, e.g., Universal Service Fund Telephone Billing Practices Litigation*, 300 F. Supp. 2d 1107, 1154 (D. Kan. (2003) (granting in part defendant's motion for referral, referring plaintiffs' Telecommunications Act claims "to the FCC to exercise primary jurisdiction over those claims" and directing plaintiffs to "commence an action against defendants with the FCC . . ."); *Multi Solutions Int'l., Inc. v. Southwestern Bell Telephone Co.*, 265 F. Supp. 2d 1216, 1227 (D. Kan. 2003) (stating that "[t]he court believes the resolution of the legal and factual issues implicated by the plaintiffs' federal law claims requires the FCC's policy expertise and specialized knowledge . . ." and requiring plaintiffs to "initiate an appropriate proceeding at the FCC . . ."); *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1102 (W.D. Mo. 2001) (granting AT&T's motion for referral and stating "[t]he questions of whether Sprint may charge access fees to AT&T for access to the Sprint PCS wireless network and, if so, the reasonableness of Sprint's charges for such services are referred to the FCC for further consideration"); *Advantel, LLC v. Sprint Communications Co. L.P.*, 125 F. Supp. 2d 800, 807 (E.D. Va. 2001) (granting in part Sprint's motion to refer and detailing specific questions to be referred to FCC); *Advantel, LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 515 (E.D. Va. 2000) (stating that "Counts III and IV of AT&T's counterclaim will be referred to the FCC under the doctrine of primary jurisdiction"); *Phone-Tel Communications, inc. v. AT&T Corp.*, 100 F. Supp. 2d 313, 322 (E.D. Penn. 2000) (granting motion to stay pending referral to FCC and detailing four questions to be referred to the FCC); *Sprint Corp. v. Evans*, 846 F. Supp. 1497, 1510 (M.D. Ala. 1994) (granting in part defendant's motion to refer issues to the FCC, detailing the questions to be referred and directing the defendant to "seek a petition for a declaratory ruling from the FCC on those issues"). Here, the district court did not refer any questions to the Commission, and the questions Frontier suggests are misleading and incomplete. Accordingly, even if the Commission answered the questions Frontier posed, the district court nonetheless might choose to refer yet further questions to the Commission if and when the stay is lifted.

the Commission's rules state only that "[t]he Commission *may*, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."²⁵ Thus, the matter of whether to issue a declaratory ruling is entirely within the Commission's discretion, as the Commission has repeated on several occasions.²⁶

C. The Petition Raises an Enforcement Matter That Should Not Be Resolved Through The Discretionary Declaratory Ruling Process.

The Petition seeks a result indistinguishable from an award of monetary damages and not a statement of general applicability, typical of petitions for declaratory ruling. As detailed above, Frontier notes in the Petition that "[t]he amount at issue, including late payment charges, exceeds \$1 million"²⁷ and seeks a ruling that Datanet "must pay Frontier its duly tariffed originating interstate access charges as billed by Frontier" plus late payment charges.²⁸

Supporting the conclusion that the Petition is directed specifically at USA Datanet, Frontier

²⁵ 47 C.F.R. § 1.2.

²⁶ *E.g., In the Matter of Communique Telecommunications, Inc. d/b/a Logical Petition for Declaratory Ruling and Interim Relief Against the National Exchange Carrier Association's Unauthorized Interference with the Continued Provision of Authorized Resale Carrier Operations*, 10 FCC Rcd 10399 (1999) ("the determination of whether to issue a declaratory ruling under 47 C.F.R 1.2 in a particular proceeding is a matter within the Commission's discretion. Issues that are heavily dependent on factual situations are not appropriately addressed through a declaratory ruling."); *In the Matter of Competitive Telecommunications Association Petition for Declaratory Ruling and Cease and Desist Order Concerning Blocking and Interim 800 Service Interexchange Access*, 4 FCC Rcd 5364, ¶7 (1989) ("the determination of whether to issue a declaratory ruling under 47 C.F.R. §1.2 in a particular proceeding is a matter within the Commission's discretion and is not mandatory"). *See also, Yale Broadcasting Co. v. FCC*, 478 F. 2d 594, 602 (D.C. Cir. 1973) ("an administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion").

²⁷ Petition at 1.

²⁸ *Id.* at 5.

styled its Petition as being “In the Matter of a Declaratory Ruling that *USA Datanet Corp.* is liable for Originating Interstate Access Charges When it Uses Feature Group A Dialing to Originate Long Distance Charges.” (emphasis added)

Frontier’s inclusion of “any similarly situated carriers” in the Petition’s request for relief is likely an attempt to obfuscate the nature of the relief it seeks. Frontier’s language rings hollow. It is clear from the Petition as a whole that this dispute regards USA Datanet’s network and operations in New York, specifically its alleged use of Feature Group A facilities from Paetec, an unrelated third party, when USA Datanet customers who subscribe to Frontier’s local circuit-switched services seek to access USA Datanet’s IP-enabled services.²⁹ No other “similarly situated carriers” are recognized or discussed in the Petition. It cannot reasonably be inferred that Frontier intends to direct the Commission’s review, and enforce a subsequent decision, against any carrier but USA Datanet.

Not only is the Petition clearly directed at USA Datanet and resolution of the parties’ particular dispute, Frontier’s request for relief is equivalent to a prayer for monetary damages. At its core, the Petition seeks to substitute for a collections action, indeed the action Frontier previously initiated at the District Court and which remains pending. Frontier has a tariff on file that it purports applies to USA Datanet’s undisputed indirect interconnection to Frontier’s network. Frontier comes to the Commission with a request for a ruling that USA Datanet pay tariffed access charges “as billed by Frontier” and tariffed late fees.³⁰ Indeed, Frontier attaches as Exhibit B its federal complaint that quantifies, to the penny, the amount of money that it believes it is owed (as of the date of the Complaint). All reasonable inferences

²⁹ *Id.* at 2-3.

³⁰ *Id.* at 9-10.

point to a conclusion that Frontier is seeking an enforceable judgment, drafted by the Wireline Competition Bureau and reviewed by the full Commission, for payment of its billed access charges. The second sentence of the Petition alleges that “[t]he amount at issue, including late payment charges, exceeds \$1 million.”³¹ This request cannot be construed as a request for clarification of regulatory law that may be applied generally to the telecommunications industry, but only as a request for damages, relief the Commission, and most certainly the Wireline Competition Bureau, does not afford in the guise of a declaratory ruling.³² Absent a primary jurisdiction referral, which is demonstrably absent here, the Commission should not opine on the propriety of applying a specific carrier’s tariff to the particular traffic of a particular service provider.³³

Furthermore, the Petition does not, as do other recent petitions for declaratory ruling, seek clarification under the Commission’s rules, whether access charges apply to a generally described service with certain characteristics or whether access charges apply to indirectly interconnected providers.³⁴ Rather, resolution of the Petition would require an

³¹ *Id.* at 1.

³² *See, e.g., Communications Vending Corp. v. Citizens Communs. Co.*, 17 FCC Rcd 24201, 24226 ¶ 60 (“The individual Defendants in these cases could not have reasonably assumed, based on the APCC petition for declaratory ruling, that they would have been sued by these particular Complainants, or that they would be liable for damages.”); *aff’d, Communications Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1076 (D.C. Cir. 2004) (FCC declaratory ruling did not impact affected parties’ right to damages).

³³ *See Mocatta Metals*, 44 FCC 2d. 605, ¶ 3.

³⁴ *See, e.g., Petition for Declaratory Ruling that VarTec Telecom, Inc. is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination* (filed Aug. 20, 2004); *Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges* (filed Sept. 21, 2005)

interpretation of specific provisions in Frontier's tariff and the assessment whether they apply to USA Datanet.³⁵

In the District Court action, USA Datanet contests the applicability of Frontier's Feature Group A tariff provisions to non-interconnected service providers, and to USA Datanet in particular, including providers to which the Commission's access charge rules may otherwise apply. Therefore, Frontier's claim for relief in its Petition, will not be resolved by a clarification whether the Commission's rules would permit a LEC, under an appropriately drafted tariff, to collect access charges from non-interconnected service providers. As such, although the issue of applicability of Frontier's tariffed access charges may be informed by the Commission's pending *IP-Enabled Services* and *VarTec* proceedings on access charges, as the District Court noted, the central dispute between the Frontier and USA Datanet, raised in the Petition as well as in the Court case, is how to interpret and apply Frontier's federal tariff in particular factual circumstances involving USA Datanet.

The Petition also raised numerous other factual issues that are not appropriately resolved in a petition for declaratory ruling context, including the specific characteristics of USA Datanet's IP-enabled services at issue, which Feature Group A rate elements, if any, USA Datanet used, and whether the Frontier-Paetec interconnection agreement has any provisions

³⁵ Notably, although the Petition talks generally about the Feature Group A rate elements purportedly in its tariff, Petition at 3, Frontier fails to identify the applicable tariff provisions or attach them. This is not surprising, perhaps, given that, under the tariff, a Feature Group A access charge customer receives a seven-digit telephone number. [Frontier Telephone Co.] (Tariff FCC No. 1 Original page 6-39, Section 6.2.1 Feature Group A, (A) Description . . . (4) "A seven digit local telephone number assigned by the Telephone Company is provided for access to FGA switching in the originating direction. The seven digit local telephone number will be associated with the selected end office switch and is of the form NXX-XXXX.") Frontier, inconsistent with its assertion that

(e.g., on the treatment of IP-enabled services and traffic, on interconnection architecture, or on intercarrier compensation) that have any bearing on these issues. The Petition is comprised entirely of Frontier's explication of its position that the particular characteristics of USA Datanet's alleged interaction with Frontier in the State of New York are such that Frontier is owed originating access charges. Its presentation is intensely fact-based and is no broader in scope than any commercial dispute between two specific parties.

The sort of factual issues described briefly above, which must be resolved to grant Frontier the specific relief against USA Datanet it seeks in the Petition, are properly resolved by the Commission, if at all, in a Section 208 formal complaint proceeding not a declaratory ruling docket. A complaint proceeding has a variety of procedures specifically designed to help the Commission and parties to narrow and resolve factual issues central to a party-specific dispute, namely, detailed complaint and answer rules,³⁶ provisions for discovery, and, if required, allowance for evidentiary hearings, followed by briefing. A declaratory ruling proceeding offers none of these protections and procedures, and is thus inappropriate for resolving the current fact-intensive dispute. Declaratory rulings were not intended for the purposes for which Frontier filed the Petition. Rather, the Commission's extensive enforcement procedures are better suited to resolve this dispute when and if it properly can be brought to this agency.³⁷ The Commission

USA Datanet is a Feature Group A customer, has never provided USA Datanet with a local telephone number.

³⁶ 47 U.S.C. §§ 1.720(a)-(j) (general pleading requirements), 1.721(a) (1-14) (contents of complaints), and 1.724 (answers).

³⁷ See also Primary Jurisdiction Referrals Involving Common Carrier, DA 00-2606 (rel. Nov. 16, 2000) ("**Generally, primary jurisdiction referrals in cases involving common carriers are appropriately filed as formal complaints with the Enforcement Bureau pursuant to section 208 of the Communications Act of 1934, as amended.** There may be circumstances, however in which this approach may not be appropriate. Accordingly, parties to a case in which a primary jurisdiction referral has been made are strongly

simply cannot allow Frontier to file a Petition in which Frontier requests a ruling that would require the Commission to disregard the factually intensive tariff dispute that underlies Frontier's lawsuit before the District Court. Accordingly, even if Section 207 does not present a bar to the Petition in light of the pending District Court complaint, the Petition should be dismissed without addressing its merits.³⁸

IV. REFUSAL TO REACH THE MERITS OF THE PETITION IS NOT AN INEQUITABLE RESULT

The dismissal of the Petition under Section 207 would not be an inequitable result. Frontier will suffer no prejudice due to a refusal to reach the merits of its Petition. The District Court concluded that, "it does not appear that some additional delay will harm Frontier, since Frontier is only now pursuing claims that date back to 1999."³⁹ Those claims are now lodged with the District Court, where they will remain for adjudication once the purpose of the Court's stay is satisfied – that is, once the Commission decides the pending *IP-Enabled Services*

encouraged to contact the Chief of the Market Disputes Resolution Division of the Enforcement Bureau for guidance *before* filing any pleadings or otherwise proceeding before the Commission in such referral.") (emphasis added).

³⁸ In the Public Notice, the Wireline Competition Bureau chose to consolidate Frontier's Petition with the VarTec petition for declaratory ruling, as well as an SBC petition for declaratory ruling, on its perception that the Petition raised "similar IP access charge issues." Public Notice at 1-2. The VarTec and SBC petitions, unlike the Frontier Petition, do not seek an interpretation and application of a particular carrier's tariff or an order that a particular service provider be required to pay that carrier's access charges as billed. In this sense, the Frontier petition raises *very different* issues than the SBC and VarTec petitions, which seek clarification of Commission rules and policies on several access charge issues affecting IP-enabled services. At most, the Commission should consolidate the Frontier Petition, and any comments received thereon, by considering them additional comments to help it resolve the issues raised in the SBC and VarTec proceedings, a result which would not be inconsistent with the District Court *Order*, unlike a resolution of the Frontier Petition on its merits.

³⁹ *Order* at 13.

and *VarTec* matters, at which time the District Court can determine the best means for moving forward with Frontier's lawsuit. The Commission, therefore, should have no reservation about complying with the mandate in Section 207 to dismiss the Petition or, in the alternative, exercising its discretion to decline to rule on *any* petition for declaratory ruling and clarifying that tariff disputes, such as Frontier now brings to the Commission, should be filed as formal complaints or in federal court.

V. CONCLUSION

For these reasons, USA Datanet respectfully requests the Commission to reject the Petition without consideration of the merits because the Petition contravenes Section 207 in light of the pending federal lawsuit and the District Court's refusal to refer any questions to the FCC on the basis of primary jurisdiction. In the alternative, assuming *arguendo* that Section 207 does not act as a bar, the Commission should decline to reach the Petition on the merits and clarify that tariff disputes and requests for orders requiring the payment of access charges, such as the Petition raises, are not the proper subject of declaratory ruling proceedings.

Respectfully submitted,

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Dated: January 9, 2006

Certificate of Service

I, Tara Keilberg, hereby certify on this 9th day of January 2006, that the foregoing

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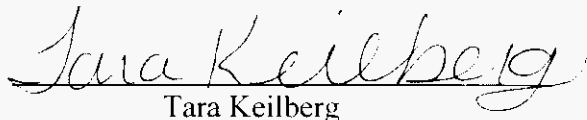
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